

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RICHARD W. KRONE	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and New York	:	
City Personal Income Tax under Chapter 46,	:	
Title T of the Administrative Code of the City	:	
of New York for the Period February 1, 1984	:	
through March 31, 1987.	:	

Petitioner, Richard W. Krone, 1755 York Avenue, New York, New York 10128, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the period February 1, 1984 through March 31, 1987 (File No. 806485).

A hearing was held before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 22, 1990 at 2:45 P.M. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether petitioner, Richard W. Krone, is liable to penalties under Tax Law § 685(g) and Administrative Code of the City of New York former § T46-185.0(g) for the unpaid withholding taxes of Kenrich Restaurant Corp.

FINDINGS OF FACT

On November 20, 1987, the Division of Taxation issued a Statement of Deficiency to petitioner, Richard W. Krone, asserting that he was liable for penalties with respect to the unpaid withholding taxes of Kenrich Restaurant Corp. for the period February 1, 1984 through

March 31, 1987. The amount due was \$19,186.94.

Also on November 20, 1987, the Division of Taxation issued a Notice of Deficiency to petitioner imposing a deficiency in the sum of \$19,186.94, based on the aforementioned penalties.

At a Bureau of Conciliation and Mediation Services ("BCMS") conference, the deficiency against petitioner was reduced to \$4,279.51, by cancelling the penalties for any quarter commencing after June 30, 1985.

In 1983, petitioner, who had sold his stock brokerage firm, was searching for another business opportunity. He entered into an agreement with one Kenneth Meisler to open a restaurant. Petitioner, who had no restaurant experience, was to finance the restaurant while Meisler, who purportedly had restaurant experience, was to operate it.

Kenrich Restaurant Corp. ("the corporation") was incorporated on or about August 30, 1983. It issued 100 shares of stock, 50 shares to petitioner and 50 shares to Kenneth Meisler. Petitioner was elected president and director of the corporation, while Kenneth Meisler was elected secretary/treasurer and director.

On December 19, 1983, the corporation purchased a restaurant and bar business from Nagio Restaurant, Inc. for a purchase price of \$350,000.00, plus security payments and liquor inventory payments of \$18,451.08, for a total of \$368,451.08. The corporation paid \$15,000.00 in cash on the execution of the contract and \$53,615.50 at the closing. The balance of the purchaser's consideration was in the form of promissory notes. Petitioner and Meisler guaranteed the corporation's lease for two years.

The cash paid on contract and at closing was paid by petitioner. Kenneth Meisler contributed little, if any, cash to the corporation. Meisler, however, executed a demand note payable to petitioner for \$45,000.00, secured by his 50% interest in the corporation.

The restaurant, a seafood restaurant called "Harbour House", opened for business on January 7, 1984. Its location was at 410 Avenue of the Americas in the Greenwich Village section of Manhattan.

Apparently the restaurant did not generate enough sales to cover its expenses. To make up the difference, petitioner loaned cash to the corporation. The 1984 loans were as follows¹:

<u>Month - 1984</u>	<u>Amount</u>
January	\$ 3,000.00
February	10,000.00
April	14,337.00
May	4,500.00
July	1,700.00
August	500.00
September	5,000.00
October	1,300.00
Total	\$40,337.00

The corporation also borrowed \$20,000.00 in June of 1984, but the corporation's books do not indicate the source of the loan.

The corporation's books reflect that petitioner received the following loan repayments and interest on loans²:

<u>Month</u>	<u>Amount</u>	<u>Loan Repayment or Interest</u>	
<u>1984</u>			
April		\$ 80.92	Interest
"	146.96		Interest
May		319.68	Interest
"		46.80	
		Unknown	
June		479.55	Interest
July		508.33	
			Interest
"		1,700.00	

Loan repayment

¹See petitioner's Exhibit "10", Income Ledger, "Other Income" column.

²See petitioner's Exhibit "10", Disbursements Ledger.

August	525.70	
"	55.60	Interest
October	41.67	Interest
November	58.72	Interest
December	64.17	Interest
"	400.00	Interest
		Unknown
<u>1985</u> January	64.17	
March	59.88	Interest
"	700.00	Interest
		Unknown

The record does not show if any loan repayments were made or interest paid after March 1985.

The only wage or salary income received by petitioner from the corporation was \$300.00 in salary for 1984. He received no dividends, bonuses or distributions from the corporation, other than the interest and loan repayments.

Petitioner acted as the restaurant's host for the first two weeks of its operation, but soon became bored and relinquished that role. He visited the restaurant only infrequently after the first two weeks of its operation.

By mid-1984, petitioner realized that the corporation was in financial difficulty. At one point, petitioner learned from the landlord that the corporation's rent was not being paid and it was then that he decided to take action. Petitioner discussed the business with another restaurateur, Robert Farley. Farley said that if petitioner could get 100% control, he (Farley) would enter into an agreement with petitioner and take over operation of the restaurant.

Petitioner demanded payment from Kenneth Meisler under the above-mentioned note and, as Meisler could not pay the \$45,000.00, petitioner obtained Meisler's 50% of corporate stock.

Petitioner then entered into an agreement with Farley whereby Farley was to receive 90% of the stock and was to assume all of the obligations of the corporation.

Farley took over the operation of the restaurant changing the name to "Black Rock Cafe" and turning it into a "Tex-Mex" restaurant.

It is unclear exactly when the changeover took place. From the corporation's books and checking account records, however, it would appear that Harbour House ceased functioning in or shortly after April 1985.

Petitioner was a signatory on the corporation's checking accounts. During the period February 1, 1984 through April 30, 1985 (which is basically the period remaining at issue after the BCMS conference) almost all of the corporation's checks were signed by Kenneth Meisler. Petitioner signed very few of the checks.

Petitioner did not hire or fire employees, pay vendors or handle the corporation's books and records. These tasks were performed by Kenneth Meisler during the Harbour House period and by Robert Farley during the Black Rock Cafe period.

Petitioner did not sign any tax returns. The corporation's 1984 income tax returns are

not in the record. The 1985 return was signed by Robert Farley, as president. The 1986 return was signed by Robert Farley, as vice-president. While petitioner's name was signed to applications for extensions of time to file for 1984 and 1985, the signatures are not that of petitioner. The 1985 and 1986 returns also carry the name of Frank Van Buren, C.P.A., who evidently prepared them.

(a) While the Division of Taxation submitted copies of withholding tax returns (Form 2101) and reconciliations (Form 2103) filed by the corporation for 1984, it did not submit copies of the backs of the Form 2101's showing the signatures, if any. The Form 2103 for 1984 is unsigned and shows \$3,235.94 withheld with zero remitted.

(b) For 1985, copies of the backs of the Form 2101's were not submitted and the Form 2103 was unsigned. The reconciliation for 1985 shows \$5,186.05 withheld and remitted. However, the withholding tax accounts receivable transcript shows only \$1,043.57 remitted.

(c) Copies of the backs of the quarterly withholding tax returns filed for January 1 through December 31, 1986 are in the record and contain no signatures. A monthly return was also filed for October 1986 showing a remittance of \$1,000.00 and it was signed by Frank Van Buren, C.P.A. There is no 1986 reconciliation in the record. The withholding tax accounts receivable transcript shows \$10,273.44 withheld and \$1,000.00 remitted.

(d) The record contains one unsigned Form 2101 for 1987 covering January 1 through March 31, 1987. The withholding tax accounts receivable transcript shows \$1,761.99 remitted with \$5,398.77 assessed.

Petitioner deducted his portion of the corporation's subchapter S losses on his own personal income tax returns.

CONCLUSIONS OF LAW

A. Tax Law § 685(g) provides, in pertinent part, as follows:

"Willful failure to collect and pay over tax. -- Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

Administrative Code of the City of New York former § T46-185.0(g)³ contained a similar provision with respect to New York City personal income tax during the period remaining at issue.

B. Tax Law § 685(n) provides, in pertinent part, as follows:

"Person defined. -- For purposes of subsection (g)...the term person includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

Administrative Code of the City of New York former § T46-185.0(n)⁴ contained a similar provision during the period remaining at issue.

C. While petitioner was not involved in the day-to-day operation of the restaurant after the first two weeks of its operation, he was, nevertheless, a director, officer and 50% shareholder. He was aware that the restaurant was in financial difficulty from its inception and, in fact, loaned the corporation substantial sums of money during the period January through October 1984. During the period remaining at issue, petitioner received interest and some loan repayments. Petitioner was also a signatory

on the corporation's checking accounts and a guarantor of the corporation's lease.

Petitioner was more than a passive investor. He had a fiduciary responsibility to see to it that the withholding taxes were properly collected and remitted and cannot abdicate that responsibility (see, Blodnick v. State Tax Commission, 124 AD2d 437 [involving a similar responsibility with respect to sales and use tax collections]).

Accordingly, petitioner was a person required to collect, truthfully account for and pay over withholding taxes on behalf of Kenrich Restaurant Corp. during the period February 1, 1984 through June 30, 1985. He willfully failed to perform said duties and is thus liable to the penalties under Tax Law § 685(g) and Administrative Code former § T46-185.0(g).

³Renumbered Administrative Code § 11-1785(g) eff. September 1, 1986.

⁴Renumbered Administrative Code § 11-1785(n) eff. September 1, 1986.

D. That the petition of Richard W. Krone is denied and the Notice of Deficiency issued against petitioner on November 20, 1987, as reduced to \$4,279.51, as per the Bureau of Conciliation and Mediation Services conference (Finding of Fact "3"), is otherwise sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE